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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-94

NO. A-923

M & H PRODUCE CO., INC.,
Petitioner,

v.

ROBERT BERGLAND, SECRETARY OF AGRICULTURE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

M & H Produce Co., Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 16, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals below has not yet been reported, but is set forth in Appendix at pages A1-A3.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the doctrine of equitable estoppel can be raised against the United States Government where the necessary elements of estoppel are shown to exist.

STATUTES INVOLVED

7 U.S.C. §499b, which provides as follows:

"It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –

* * * * *

"(4) For any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had . . ."

7 U.S.C. § 499h, which provides as follows:

"(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any

of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

"(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

"(1) Whose license has been revoked or is currently suspended by order of the Secretary;

"(2) Who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499(b) of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

"(3) Against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

"The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation of finding flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount

satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after 30 days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section."

STATEMENT OF THE CASE

On November 7, 1972, Floyd F. Hedlund, Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, filed a complaint against the Petitioner, M & H Produce Co., Inc. (M & H), which charged that M & H had wilfully, repeatedly, and flagrantly violated Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)) by failing to make payment promptly for 129 shipments of perishable agricultural commodities in interstate commerce which had been purchased, received, and accepted without complaint.

In its answer M & H admitted that it had purchased, received in interstate commerce, and accepted without complaint the 129 lots in question; that the payment was due as alleged; and that it had failed to pay on the dates alleged. M & H denied, however, that it had violated the Act or that the allegations constituted wilful, repeated or flagrant violations of the Act. M & H asserted that it had made a payment of 25% of the original purchase price under a settlement agreement and that such payment constituted payment in full. It also asserted that it had made the 25% payment as a result of representations by the Department of Agriculture that no disciplinary action would be instituted if the payment were made.

M & H later amended its answer to deny that the payment dates alleged in the complaint correctly represented the understanding and agreement of the parties.

The filing of the complaint arose from the following fac

M & H, a Pennsylvania corporation, licensed by the Department of Agriculture, engaged in the business of buying and selling produce. Martin Hyman was its principal officer and operator. Samuel Gershenfeld, Hyman's son-in-law, assisted in the business.

As a general rule, M & H received produce orders from retailers and then arranged to purchase the produce from growers or wholesalers. Payment to M & H from the retailers for produce sold was usually not made until M & H has paid its suppliers.

Pursuant to applicable regulations, 7 C.F.R. 46.1 *et seq.* M & H had entered into agreements with most sellers from whom it purchased produce as to when payment was due to each seller.

On March 12, 1971, the two banks with which M & H dealt froze its checking accounts and refused thereafter to pay any checks presented for payment. M & H placed no further orders for produce with any produce supplier and conducted no further business. It took immediate steps to contact the suppliers from whom it purchased, and it notified its other creditors.

Subsequently, checks issued by M & H and drawn upon its account at the two banks, payable to the suppliers listed in the transactions described in the complaint, where dishonored by the banks and returned unpaid.

Martin Hyman engaged the services of Joseph D. Tydings, Esquire, and the law firm of Danzansky, Dickey, Tydings, Quint and Gordon, Washington, D.C., to represent him and M & H with respect to the legal problems arising from the banks' action. A meeting was held promptly with the creditors of M & H. Mr. Tydings was present along with Robert A. Klein, Esquire, an associate. A creditors committee was established at that meeting, and all of M & H's creditors agreed, either expressly or by implication, to defer payment for produce previously sold to M & H until the creditors committee could propose a plan for payment acceptable to all creditors.

Several produce creditors made informal complaints to the Department of Agriculture. Correspondence and telephone communications ensued between the Regulatory Branch, Fruit and Vegetable Division, Department of Agriculture, and

attorneys representing M & H and Martin Hyman. Seven sellers filed formal complaints, and default orders were issued. Because M & H failed to comply with the default orders, its license was suspended.

After several meetings of the creditors committee, it was agreed that a 25% payment was to be proposed to all unsecured creditors. Conditions of payment were that all creditors agree to accept 25% payment in full satisfaction, that all agree to sign orders of satisfaction and to withdraw complaints filed with the Department of Agriculture, and that the Department of Agriculture agree not to take disciplinary action against M & H to prevent Martin Hyman from returning to work and continuing to work in the produce business.

In July, 1971, Klein received explicit assurance from John Dimond, an official of the Department's Fruit and Vegetable Division, that when the settlement was effected, when the 25% payment was made to the produce creditors, and when orders of satisfaction were filed by all of the produce creditors, all complaints against M & H would be dismissed by the Department of Agriculture and Hyman would not thereafter be prevented from working in the produce field. Additional assurance was given that Hyman would not be suspended by the Department and that he would be permitted to work in the produce field without having to obtain a bond.

Acting upon this explicit assurance of the Department of Agriculture, after obtaining the money to settle, Hyman directed that the settlement be effected.

By October, 1971, each unsecured creditor received a 25% payment, as agreed in the settlement, and signed Orders of Satisfaction which were sent to the Department of Agriculture.

In the meantime, unbeknownst to M & H, on April 26, 1971, Dimond had opened a disciplinary file concerning M & H. Moreover, Dimond withheld from M & H and its attorneys information concerning disciplinary action against it until after settlement had been effected and the 25% payment made.

A hearing was held before Harry S. McAlpin, Chief Administrative Law Judge, Department of Agriculture, who, on November 8, 1974, filed an initial decision dismissing the Department's complaint. On appeal, the Department's Judicial Officer reversed completely and ruled that M & H had committed flagrant and repeated violations of the Act and ordered that the facts and circumstances be published. M & H's subsequent Petition to Reopen and Petition for Rehearing, Reargument, and/or Reconsideration were denied.

The ruling of the Judicial Officer was appealed to the United States Court of Appeals for the District of Columbia Circuit, which, on February 16, 1977, entered Judgment affirming the decision of the Judicial Officer.

REASONS FOR GRANTING THE WRIT

This case presents an important question of Federal law which should be resolved by the Supreme Court. The decision of the Court below in denying the application of equitable estoppel against the Federal government conflicts with the decisions of the Court of Appeals for the Ninth Circuit. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970); *United States v. Lazy F.C. Ranch*, 481 F.2d 985 (9th Cir. 1973). The principal question in those cases and in the case at bar is whether equitable estoppel can be raised against the United States government.

Traditionally, estoppel against the Federal government was not favored. Thus, many courts have limited the imposition of estoppel to situations in which the government acts in a proprietary capacity. See, e.g., *United States v. County of Lawrence*, 173 F. Supp. 307 (W.D. Pa. 1959).

In recent years, however, because of the Federal government's growing involvement in all facets of our national life, the barrier against governmental immunity from estoppel has begun to crumble. Recent decisions by the Court of Appeals for the Ninth Circuit are in line with these developments. In *United States v. Georgia-Pacific Co.*, 421 F. 2d 92, 100 (9th Cir. 1970), that Court stated:

> "The growth of government and the concomitant increase in its functions, power and contacts with private parties has made many courts increasingly reluctant to deny the defense of equitable estoppel in appropriate situations. The Government, in its caretaker role for all the public, should not be bound by the unauthorized or unlawful acts of its representatives. On the other hand, it is hardly in the public's interest for the Government to deal dishonestly or in an unconscientious manner. This is especially imperative in a time when few individuals and corporations, if any, can escape numerous dealings with the Government and its agents."

Other recent decisions have permitted the application of equitable estoppel against the Federal government even when acting in its sovereign capacity. In *United States v. Lacy F.C. Ranch*, 481 F.2d 985 (9th Cir. 1973), the United States asserted that it was entitled to recover certain money that had been paid to the ranch by mistake. The ranch had attempted to qualify for certain benefits under the Acreage Reserve &

Conservation Programs of the Soil Bank Act. Initially, the ranch had been told that it could not qualify. An agent of the Agricultural Stabilization and Conservation Service told the ranch, however, that with certain modifications it could qualify. After the changes were made, the processing authorities certified that the ranch was entitled to payment, and payment was made. When it was later determined that the regulations then in effect prohibited payment to the ranch the government sued for a refund. The District Court entered judgment for the ranch, however, on the ground of equitable estoppel. In affirming, the Court of Appeals reviewed the history of equitable estoppel against the government. After discussing several cases, the Court stated:

> "The *Moser-Brandt-Schuster* line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel . . . . This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more relucant to estop the government when it is acting in this capacity." *Id.* at 989.

Another Ninth Circuit case affirming the same principles is *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975). After concluding that the elements of estoppel existed, the Court stated:

> "Further, applying the test enunciated by this Court in *Lazy F.C. Ranch, supra*, it is clear that estoppel is applicable here. Governmental conduct

> would work a serious injustice if this family were divested of the home in which they have invested so much of themselves.
>
> "The interest of the public would not be unduly threatened or damaged by invoking estoppel against the government . . . . And perhaps more importantly, the public has an interest in seeing its government deal carefully, honestly, and fairly with its citizens." *Id.* at 412-13.

In *United States Immigration and Naturalization Service v. Hibi*, 414 U.S. 5 (1973), this Court reversed a decision of the Court of Appeals of the Ninth Circuit and denied relief based on estoppel against the government. Hibi, a Philippine native, sought naturalization in 1967 under Sections 701-05 of the Nationality Act of 1940. The Act permits for naturalization of non-citizens who had served honorably in the Armed Forces of the United States during World War II. Hibi had so served, but his 1967 petition did not meet the Act's requirement that petitions be filed no later than December 31, 1946. He asserted estoppel because of the government's "failure to advise him, during the time he was eligible, of his right to apply for naturalization, and from [INS's] failure to provide a naturalization representative in the Philippines during all of the time [Hibi] and those in this class were eligible for naturalization." 414 U.S. at 7-8.

The Court of Appeals held that because the authority of the only representative who could have naturalized Hibi had been revoked, and because no successor had been appointed, the government was estopped from relying on the passage of the filing deadline for naturalization.

In reversing, this Court held that "estoppel can only be available in the citizenship and immigration context where there

has been 'affirmative misconduct' on the part of the Government." 414 U.S. at 8. The majority of this Court were unable to find "affirmative misconduct" on the part of the government based on the facts of that case. Relief based upon estoppel was, therefore, denied.

The distinction in Hibi is between a passive "failure" on the part of the government and active "affirmative misconduct". Thus, Hibi must be limited to its specific facts. Additionally, Hibi applies only to those cases in which citizenship and immigration are in question. To the extent that the Court's decision in Hibi may be said to apply to all sorts of government conduct, further consideration by this Court is required to define what is meant by "affirmative misconduct" in cases of equitable estoppel. Only in that manner will it be possible to set forth a rule of uniform application.

The four elements of equitable estoppel are stated in *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970):

> "Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury."

All four elements were shown to have existed in the present case.

First, the Department of Agriculture was aware of all of the facts. Dimond, the Department's official, was intimately involved with the case. He had demanded, in fact, that he be kept fully informed. Second, the Department knew that M & H and its representatives were taking certain actions based upon the information and the repeated assurances given to them by the Department. Third, M & H was never made aware that from the beginning the Department intended to file a disciplinary action after the settlement was concluded. The Department actively concealed from M & H that such action was contemplated. Fourth, M & H and Hyman acted to their detriment. Hyman raised the money to pay M & H's creditors only upon the Department's guarantee that he would be able to continue to work in the produce industry. He was under no legal obligation to pay the corporation's creditors and he did so only after receiving the Department's guarantee.

Application of the principle enunciated in the Ninth Circuit cases to the facts in the case at bar should raise an equitable estoppel. All the necessary elements to establish equitable estoppel exist. The government's assurances upon which it subsequently reneged constitute "affirmative misconduct" sufficient to make equitable estoppel available as a defense.

The Court below held incorrectly that "the company has no defense that promissory estoppel bars the imposition of the sanction here." In suggesting that the record did not establish that the government had promised to withhold disciplinary action under the terms of the settlement agreement, the Court below was in error.

The facts clearly indicate that Dimond did make affirmative representations on behalf of the Department of Agriculture to the effect that in settling with its creditors, M & H would not be subject to disciplinary action and Hyman would not be prevented from continuing to work in the produce business. Although Dimond testified on direct examination that no assurances had been given, on cross-examination, after repeated efforts to elicit an answer to the fundamental question, Dimond finally admitted giving those assurances.

The Court below also suggested that threat of criminal prosecution was instrumental in persuading Hyman to effect a settlement. That conclusion is not supported by the facts. The sole basis for settlement was the repeated assurance by the government that disciplinary action would not be taken.

The question presented here is of vital significance as it respects the continuously expanding role that the Federal government plays in the lives of private citizens. As the Court stated in *Santiago v. Immigration and Naturalization Service*, 526 F.2d 488, 494 (9th Cir. 1975):

> "Equitable estoppel is a rule of fairness by which the courts protect the reliances and expectations of innocent persons from defeat by those who have induced those reliances or expectations."

Although circuits other than the Ninth Circuit have been reluctant to apply equitable estoppel to government actions, it is now necessary that they do so in order to insure equity and fair treatment to all parties. Clear guidance from this Court is needed to insure uniform treatment in all circuits.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

J. HARDIN MARION
PETER J. SOMMER
Attorneys for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1621 September Term, 1976

M & H Produce Co., Inc., Petitioner

v.

John A. Knebel, Secretary of Agriculture and the United States of America, Respondents

PETITION FOR REVIEW OF AN ORDER OF THE U.S. DEPARTMENT OF AGRICULTURE

Before: WRIGHT, LEVENTHAL and WILKEY, Circuit Judges

JUDGMENT

This cause came on for consideration on a petition for review of an order of the U.S. Department of Agriculture and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the U.S. Department of Agriculture on review herein is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
/s/ George A. Fisher, Clerk

MEMORANDUM

This appeal is taken from disciplinary proceedings of the Secretary of Agriculture against M & H Produce Co., Inc., a dealer in perishable commodities. We agree that the Secretary properly found that the company engaged in "flagrant or repeated" violations of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a *et seq.*, and affirm his revocation of its license.

Under the Act, 7 U.S.C. § 499(b)(4), the company was required to "make full payment promptly" in its purchases of commodities. Due to the severe financial difficulties of the company, its unsecured trade creditors agreed to accept payment of 25 cents on the dollar six months or more after the obligations were first due. The judicial officer below found that this arrangement did not constitute full and prompt payment. The company argues, however, that since the unsecured creditors agreed to modify the terms of the original payment the company by definition fully and promptly satisfied its obligation when it complied with the modified terms. This argument is unacceptable. The record fully establishes that the unsecured creditors agreed only because those were the best conditions available, as against bankruptcy for the company and no payment at all. The conclusion is persuasive that:

> Where the debtor is insolvent, payment of 25%, as the judicial officer rightly concluded, may be accepted in full satisfaction of the debt, but it is not full payment, under the Act. The creditors' acceptance of what little they could attain is irrelevant to the company's violation of the Act. Gv't. Br. at 24.

As for the finding of "flagrant or repeated" violations, there is substantial evidence in the record to support both characterizations. That over $50,000 remains unpaid after the settlement evidences the "flagrancy" of the violation. See *Reese Sales Company v. Hardin*, 458 F.2d 183 (9th Cir. 1972) ("flagrant" violation where about $20,000 remained unpaid).

This unpaid sum accrued from 128 transactions, thereby evidencing the "repeated" course of violations. By engaging in "check-kiting," the employees of the company showed their awareness of its shaky financial condition.

Finally the company has no defense that promissory estoppel bars the imposition of the sanction here. It appears, first of all, that the judicial officer properly found that the record did not establish that the government had made a promise to withhold a disciplinary proceeding on the condition that 25% would be paid to the unsecured creditors. Evidence in the record, *e.g.*, the memos of an attorney for the company, suggests rather, as the judicial officer believed, that the assurances of the government were directed not at disciplinary prospects but at reparations sanctions, which could be avoided if the aggrieved parties were satisfied. Moreover, the judicial officer properly found that the record did not show that there was a change in position in reliance on the purported promise. In other words, the partial payment would likely have been made for the company by the employees regardless of any considerations as to possible disciplinary proceedings. Mr. Hyman agreed to give up all his assets to make the payments at a meeting that came ten days before the creditors even submitted their informal complaints to Agriculture. The record amply supports the suggestion of the judicial officer that there were many other concerns, like the threat of criminal prosecution, that animated Mr. Hyman's contributions to the company's payments.

In sum, therefore, we find that the decision of the Secretary of Agriculture is supported by the evidence on all counts and must be affirmed.